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— Book Review —

HAROLD BRUFF,
UNTRODDEN GROUND:
AMERICA'S EVOLUTIONARY
PRESIDENCY

Martin S. Flaherty[†]

Harold Bruff's *Untrodden Ground: America's Evolutionary Presidency* is by any measure a significant contribution to the debate over what may be the critical question facing American constitutionalism today. As witness recent books by Bruce Ackerman,¹ Eric Posner and Adrian Vermeule,² Jack Goldsmith,³ and the relentless John Yoo,⁴ executive power, for better or worse, today threatens to overwhelm traditional conceptions of the separation of powers.⁵ Professor Bruff's work, among other things, seeks to show how the nation got to this point and, in so doing, fills a wide gap left open by most legal scholarship. It seeks to achieve this goal with a series of case studies showing the ways various presidents have expanded and shaped executive authority in ways that the Founders would scarcely recognize. Professor Bruff, a rigorous, respected, yet oddly underappreciated expert on executive authority, is ideal for the task. This combination of topic and author should find the literate "lay" audience he seeks, which can only be a good thing given the current level of political discourse. At the same time, the volume should make no less of a contribution to scholarly discourse as well.

Untrodden Ground advances a careful central thesis, which has several sensible corollaries. Its main task is to demonstrate how the

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1. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2013).
2. ERIC A POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).
3. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).
4. JOHN YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2009).
5. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

development of the modern executive has been a story on ongoing custom, mostly occurring beyond the conceptions of the Founders and outside the case law of the Supreme Court. That is, Bruff argues that what accounts for the actual working relationship between Congress, the President, and the courts is not to be found in the text of the Constitution, its structure, the Founders' original understanding(s)—and still less in the relatively few landmark separation of powers cases decided by the Supreme Court—but instead in the ways that they have worked out shared and exclusive powers over time. As Bruff further shows, the resulting arrangements have generally reflected a steady expansion of executive authority for many reasons. Presidents can take the initiative in ways that collective bodies such as Congress, and reactive institutions such as the courts, cannot. The nation's ever-expanding foreign policy commitments and national security concerns tend to favor executive power. The President's role as the head of a political party in a system that the Founders never contemplated enhances executive power still further.

This is a story known to historians, such as Forrest McDonald,⁶ and political scientists, such as Theodore Lowi,⁷ even to historically inclined political scientists who became President, such as Woodrow Wilson.⁸ Yet it is generally absent from legal scholarship. It would have been an achievement simply had Professor Bruff imported the work done by political science departments to law schools. He has, however, done far more. For one thing, he has updated that work. And, with rigor and imagination, he has made a contribution that would stand on its own.

Untrodden Ground does this by recounting how various presidents have actually expanded executive authority in practice. His first claim is descriptive, namely, that Presidents possess ample power to do great good or harm to the nation under a formulation of their power that affords them broad power of initiative yet does not allow them to ignore statutes. The book's second major claim moves to the normative. For Bruff, unilateral presidential assertions of power do not attain legitimacy unless and until receiving the assent of Congress and the people.

Untrodden Ground explores both points with a series of case studies. A case study approach keyed to various presidents is an ideal way to drive home the central idea that the shape of the modern presidency lies not with the Constitution but in the assertions various

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6. FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* (1994).
 7. THEODORE J. LOWI, BENJAMIN GINSBERG, KENNETH A. SHEPSLE & STEPHEN ANSOLABEHERE, *AMERICAN GOVERNMENT: POWER AND PURPOSE* (13th ed., 2013).
 8. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908).

presidents have made over time. Choosing eleven such studies—not counting the chapter on the Founding—also seems right. The number permits the case studies to have depth without being lengthy, in turn makes the book manageable, and still covers nearly one-fourth of our Chief Executives. The trick becomes which eleven to pick. Professor Bruff's choices are also hard to fault. In the main he has—with one exception—chosen the strongest presidents, who by definition have pushed the constitutional limits the furthest. On this basis, Woodrow Wilson, for his wartime expansion of executive authority and peacetime failure; Polk, for his own wartime adventurism; and even Van Buren, for his transformation of presidential selection through true parties, are all candidates for further inclusion.

Conversely, the choice of Andrew Johnson, the one included failure, suggests that it might be useful to select a weak president.⁹ Additional “mirror image” case studies—that is, consideration of legislative assertions of power during the age of what Wilson described as “Congressional government” under “weak” presidents such as Hayes, or the second Harrison—or for that matter, in their different ways, Gerald Ford or Jimmy Carter—might provide an interesting, more complicated angle on the overall story of executive aggrandizement.

To an extent, these great strengths—as well as the possible selection bias—appear in the individual chapters. On one hand, the accounts of Washington¹⁰ and Jefferson¹¹ show how fast and far these early presidents departed from initial constitutional expectations to enhance the office in ways great and small. They also show how the judiciary either largely or entirely stayed on the sidelines. Each chapter does so, moreover, with a firm command of the leading scholarship of the era and with reference to several lesser-known episodes. On the other hand, the stories told do not go much further than confirming that such strong Presidents wielded significant power that enhanced the office even as it sometimes ran into effective congressional or popular opposition. Once more, it might have been useful to know whether these episodes illustrated any overall pattern, whether executive expansion, relative stasis, or cyclical ebb and flow and why.

Untrodden Ground is nonetheless a notable work in several respects. As noted, it addresses a critical topic that tends to generate more heat than light. It does so with thoughtfulness and moderation. Not least, the book also provides an extra-judicial, post-Founding historical approach that goes beyond most legal scholarship on executive authority.

Beyond that, *Untrodden Ground* is innovative, interesting, and ultimately important. The innovation lies in its use of history as

9. HAROLD BRUFF, *UNTRODDEN GROUND*, 201–02 (2015).

10. *See id.* at 30.

11. *See id.* at 3.

refracted through constitutional law and theory. As noted, there are several histories of the presidency that necessarily recount the rise of the executive to its current primacy. Few, however, do so with a focus on constitutional doctrine, interpretation, and development. What studies there are, such as by John Yoo¹² or Steven Calabresi and Christopher Yoo,¹³ are either tendentious or severely one-sided. Interest in the book, considered a bit more fully, should result from Professor Bruff's recapture of important episodes in presidential power grabs, which are usually compelling in themselves, with an eye to considering current struggles. The book's importance, as noted, rests on precisely the immense power recent presidents have exercised and the even more extensive claims that they continue to assert.

These assets should ensure that *Untrodden Ground* reaches the wide audience it deserves. Professor Bruff himself makes clear that his intended audience is not just legal academics and students, but educated and informed citizens who have an interest in the direction of their government.¹⁴ This makes sense on several counts. From a civic standpoint, rigorous and thoughtful accounts of our evolving constitutional framework need to move beyond law schools and into the general public, especially since this space appears currently filled by tendentious polemics. Happily, the volume will do just this. The stories are dramatic. The personalities are compelling. The writing is vivid. Perhaps ironically, the only thing that undercuts the book's ambition in this regard is its own rigor. The wealth of historical and legal detail, while necessary, may be daunting to the general lay reader. That said, Professor Bruff does make the rigor as palatable as possible.

As for the more specialized scholarly audience, *Untrodden Ground* should fill a significant gap. As noted, it most closely resembles political histories of the presidency, such as Forrest McDonald's *The American Presidency*.¹⁵ Such works, however, do not grapple with the constitutional dimension with the same analytic rigor that a law professor as Bruff would. Conversely, leading accounts by law professors tend to sacrifice either historical focus or integrity in the service of various legal prescriptions. Some are truly problematic, such as John

12. See Yoo, *supra* note 4.

13. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

14. See Bruff, *supra* note 9, at 9 (stating that the modern interpretation of law is a set of practices that have become normatively binding upon the community. While describing the law as a necessary part of politics, the book balances law and political power within the normative understanding of each, and its points are therefore both beneficial to scholars and laypersons.).

15. See Forrest McDonald, *supra* note 6.

Yoo's *Crisis and Command*,¹⁶ or at least one-sided, for example, Calabresi and Christopher Yoo's *The Unitary Executive*.¹⁷ Others are provocative yet credible, including Ackerman's *Decline and Fall of the American Republic*¹⁸ on the "left" and Posner and Vermeule's *The Executive Unbound*¹⁹ from the "right." Few, if any, seek to consider the evolution of the presidency, by a specialist, with an approach balancing history and constitutional law as well as with a balanced position on executive power itself. This would be reason enough to turn to the volume.

Yet there is at least one reason more. The accounts that Professor Bruff carefully provides have significant implications for constitutional interpretation not just with respect to separation of powers, but in general. In particular, *Untrodden Ground* undermines standard attempts to cash out specific doctrine based upon text, structure, and, most of all, original understandings. Text hardly suffices since it is too often exceedingly vague and contested—the Executive Vesting Clause, the Appointments Clause—or simply not there—removal, treaty termination.²⁰ Likewise, structural inference may yield great functional principles such as balance among the three branches to prevent concentration of power but falls short of providing compelling specifics to settle whether such devices such as the legislative veto should be deemed legitimate.²¹ Most of all, history employed in the wooden originalism of Justice Scalia proves to be a false god. As Justice Jackson noted, for most modern separation of powers controversies, the relevant

16. See John Yoo, *supra* note 4.

17. See Calabresi & Yoo, *supra* note 13.

18. See Ackerman, *supra* note 1.

19. See Posner & Vermeule, *supra* note 2.

20. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power, Essentialism, and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004).

21. Compare *INS v. Chadha*, 462 U.S. 919, 944 (1983) (stating that even if a law is "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority"), with *INS v. Chadha*, 462 U.S. 919, 967, 968 (1983) (White, J., dissenting) (stating that the Court's actions have "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'" The veto was the main means of "secur[ing] the accountability of executive and independent agencies," and without that veto, Congress is left to choose between refraining from the delegation of authority and abdicating its authority to the executive branch and agencies.).

historical materials are simply too conflicted and contradictory to provide clear answers with any confidence.²²

Untrodden Ground confirms these challenges by showing what *has* generally settled border disputes among the branches—constitutional custom. As Professor Bruff shows over and over, usually the arrangements that stick are those initially undertaken by the President and ultimately accepted by Congress or the electorate. This is not to say that custom is itself always easy to discern. Curtis Bradley and Trevor Morrison recently outlined the various challenges in reading relevant custom to settle separation of powers questions.²³ Professor Bruff's careful accounts of key episodes in our over two centuries of constitutional custom nonetheless make the task immeasurably easier.

Finally, *Untrodden Ground* raises questions that it cannot fully resolve as a work of history. First and foremost, has the overall shift in power toward the executive branch that custom has brought about done more harm than good? Answering this question in constitutional terms would at the very least require some way to assess whether the fundamental commitment to balance is being fulfilled, or if custom has altered that commitment itself in favor of the type of executive power required for the nation to prevail in an ever more dangerous world. Something like this latter position currently appears in the work of leading conservative scholars such as Posner and Vermeule,²⁴ as well as Jack Goldsmith.²⁵ One problem with these approaches, however, is that while custom may be able to fill in even grand gaps and details, such as removal, claiming that it can alter truly fundamental constitutional commitments—such as balance—without the affirmative deliberation of the amendment process, this is a claim of an entirely different order.

It is for this reason that other modern scholars, such as Bruce Ackerman, view the customary hegemony of the President with substantial alarm.²⁶ As he and others note, Congress's collective action

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22. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring). Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the narrowest way. *Id.*
 23. See Curtis A. Bradley & Trevor W. Morrison, *Essay: Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1127 (2013).
 24. See Posner & Vermeule, *supra* note 2.
 25. Goldsmith, *supra* note 3.
 26. See Ackerman, *supra* note 1.

problems, the creation of the administrative state, the nation's rise to superpower status, all suggest that whatever restraining power Congress may have exercised is in decline. Nor are these phenomena new. Perhaps nowhere has such alarm been more eloquently expressed than by Justice Jackson in a passage of his classic *Youngstown* concurrence that too often gets edited out in the casebooks. The classic opinion concluded with a dark mixture of despair and resolve:

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.²⁷

Untrodden Ground may not strike a similar chord of despair. But it should serve as a wake-up call. Professor Bruff's case studies add up to an enormous net gain for the executive at the expense of the legislature and the courts. On the assumption that the Madisonian dedication to balance holds, this enormous shift in power has to raise grave questions and concerns. And whether first or last, the volume demonstrates that the courts alone will not be able to stem the tide. Instead, as Justice Jackson really argued and as Professor Bruff confirms, the ultimate checks must come from Congress and the people. *Untrodden Ground* should help educate all concerned to make informed and prudent choices.

27. See *Youngstown*, 343 U.S. at 655 (1952) (Jackson, J., concurring).